93-963

NO.

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1993

J. L. REICHLIN, individually, and
UNKNOWN POLICE OFFICERS OF
THE CHESTERFIELD COUNTY
POLICE DEPARTMENT,

Petitioners,

v.

VIRGINIA ENWEREMADU, STANIEL
ENWEREMADU, an infant, and STANTON
ENWEREMADU, an infant,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Steven Latham Micas
County Attorney
(Counsel of Record)
Jeffrey Lee Mincks
Chesterfield County
Post Office Box 40
Chesterfield, VA 23832
(804)748-1491

Brief Printing Specialist, 1001 E. Main Street, Suite 210
Richmond, Virginia 23219, (804)644-0700

QUESTION PRESENTED FOR REVIEW

1. Whether the United States Court of Appeals for the Fourth Circuit erred in holding that the District Court abused its discretion when it dismissed Respondents' 42 U.S.C. § 1983 action against local police officers because of Respondents' refusal to assert a Fourteenth Amendment cause of action.

LIST OF PARTIES

The Petitioners are J. L. Reichlin, a police officer for the County of Chesterfield, Virginia and Unknown Police Officers of Chesterfield County, Virginia.

The Respondents are Virginia Enweremadu and two of her minor children, Stanton Enweremadu and Staniel Enweremadu.

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VIRGINIA ENWEREMADU, STANIEL
ENWEREMADU, an infant, and STANTON
ENWEREMADU, an infant,

Respondents.

**PETITION FOR WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

The petitioners, J. L. Reichlin and unknown police officers of the Chesterfield County Police Department, respectfully pray that the Court issue a writ of certiorari to

the United States Court of Appeals for the Fourth Circuit and summarily reverse the judgment entered by the court of appeals on August 18, 1993. U.S. Sup. Ct. R. 16.1.

OPINIONS BELOW

The United States District Court for the Eastern District of Virginia (Williams, D.J.) issued an opinion on May 13, 1992 granting Officer Reichlin's Motion to Dismiss. App. 28-33. The District Court issued an opinion on June 18, 1992 denying Enweremadu's Motion for Relief from Judgment and to Amend the Complaint. App. 34-41. The opinion of the United States Court of Appeals for the Fourth Circuit is unpublished, but the full text is available on Lexis at 1993 U.S. App. Lexis 20920 and Westlaw at 1993 WL 311914 (4th Cir. (Va.)). The court of appeals' decision also appears at 2 F.3rd 1149 reversing the District Court for the Eastern District of Virginia. The Fourth Circuit's opinion is reproduced at App. 1-27.

JURISDICTION

Enweremadu brought this lawsuit in the United States District Court for the Eastern District of Virginia invoking federal jurisdiction under 42 U.S.C. §§ 1983 and 1988, and 28 U.S.C. § 1343. The judgment of the United States Court of Appeals for the Fourth Circuit was entered on August 18, 1993. Officer Reichlin filed a timely Petition for Rehearing and Suggestion for Rehearing In Banc, which was denied on September 15, 1993. This Petition is timely filed. Jurisdiction is invoked in this Court under 28 U.S.C. § 1254(1).

RELEVANT STATUTES AND REGULATIONS

The First Amendment to the United States Constitution states:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

The Fourth Amendment to the United States Constitution states:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probably cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Section 1 of the Fourteenth Amendment to the United States Constitution states:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983 states:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen

> of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

On March 6, 1990, Officer J. L. Reichlin ("Officer Reichlin") of the Chesterfield County Police Department went to the residence of Virginia Enweremadu and her children ("Enweremadu") in Chesterfield County, Virginia to serve arrest warrants issued against Virginia Enweremadu for larceny and vandalism. In conjunction with other local police officers of Chesterfield County, Officer Reichlin arrested Virginia Enweremadu and transported her to the local magistrate.

On October 17, 1991, Enweremadu filed a Complaint in the United States District Court for the Eastern District

of Virginia alleging that Officer Reichlin and the other local police officers of Chesterfield County, Virginia used excessive force against her while executing the arrest warrants. Enweremadu asserted a cause of action against Officer Reichlin "under the provisions of the First and Fourth Amendments to the United States Constitution" and under 42 U.S.C. §§ 1983 and 1988. Enweremadu did not invoke the provisions of the Fourteenth Amendment to the United States Constitution. Enweremadu asserted jurisdiction in the District Court pursuant to 28 U.S.C. § 1343.

Relying on Monroe v. Pape, 365 U.S. 167 (1961), Officer Reichlin moved to dismiss the Complaint pursuant to Fed. R. Civ. P. 12(b)(1) and (6). Officer Reichlin argued that since local police officers cannot violate the First and Fourth Amendments to the United States Constitution, but instead, can violate only the Fourteenth Amendment, the

Complaint failed to state a cause of action under federal law.

In response to Officer Reichlin's Motion to Dismiss, Enweremadu filed a Memorandum stating that, even though she was "fully aware of the doctrine of selective incorporation, 'which enforces First and Fourth Amendment Rights against state officials pursuant to the Fourteenth Amendment'" (App. 14), she was making a claim solely under the First and Fourth Amendments and not under the Fourteenth Amendment. Accordingly, Enweremadu did not move the District Court for leave to amend her Complaint to allege a violation of the Fourteenth Amendment "despite repeated promptings to do so from [Officer Reichlin] and the district court." App. 23, n.6.

Seven months later, on May 13, 1992, the District Court granted Officer Reichlin's motion and dismissed Enweremadu's federal claims for lack of jurisdiction and failure to state a claim for which relief can be granted. The

District Court relied upon Baker v. McCollan, 443 U.S. 137 (1979) and Wallace v. Jaffree, 472 U.S. 38 (1985) to hold that since local officials cannot violate the First and Fourth Amendments to the United States Constitution except through the Fourteenth Amendment, Enweremadu's "persistent refusal" (App. 24, n.7) to assert a claim under the Fourteenth Amendment left the court no alternative but to dismiss her claims with prejudice. On June 18, 1992, the District Court denied Enweremadu's Motion for Relief from Judgment and to Amend the Complaint, finding Enweremadu's contention that she misunderstood Officer Reichlin's "rather simple motion to dismiss" to be "incredible". App. 36, 38. As the District Court concluded, "any conceivable error should have been eliminated by the Defendant in his Reply Brief which warned Plaintiff that she had 'completely misse[d] the point'". App. 37-38. Enweremadu appealed to the United States Court of Appeals for the Fourth Circuit seeking reversal of the

District Court's decision. On August 18, 1993, the Fourth Circuit entered judgment reversing the decisions of the trial court. The reversal was based on a per curiam opinion of the Fourth Circuit (the "Opinion").[1] The Honorable J. Michael Luttig, Circuit Judge, dissented from the per curiam opinion (the "Dissent").

The panel majority concluded that since Enweremadu had alleged facts adequate for the Fourth Amendment standard set forth in Graham v. Conner, 490 U.S. 386 (1989), her failure "to note the jurisdictional connection provided by the Fourteenth Amendment" did not warrant

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[1]Although the Opinion is unpublished, such opinions can be cited if the unpublished opinion "has precedential value in relation to a material issue in a case and there is no published opinion that would serve as well". 4th Cir. Internal Operating Procedure 36.6. No published opinion holds that local police can be sued directly under the Fourth Amendment and § 1983. Since this Opinion is apparently the first to craft a direct Fourth Amendment cause of action against local officials it will certainly be cited in the future.

dismissal under Fed.R.Civ. P. 12(b)(6). App. 9. The Dissent more accurately characterizes the holding as follows:

> The court holds today by unpublished opinion that an experienced district judge abused his discretion in dismissing a complaint under 42 U.S.C. § 1983 filed by counseled plaintiffs which, even after an opportunity to amend had been provided, alleged that local police officers violated a plaintiff's Fourth Amendment rights.

App. 12 (emphasis in original). The Fourth Circuit's Opinion, for the first time, permits a plaintiff to bring a § 1983 claim of excessive force against local police officers directly under the Fourth Amendment without asserting any cause of action under the Fourteenth Amendment. See, e.g., Baker v. McCollan, 443 U.S. 137 (1979); Monroe v. Pape, 365 U.S. 167 (1961); Wolf v. Colorado, 338 U.S. 25 (1949).

REASON FOR GRANTING THE WRIT AND SUMMARILY REVERSING UNDER SUPREME COURT RULE 16.1

1. The Fourth Circuit's Opinion eliminates the Fourteenth Amendment as a necessary jurisdictional element for § 1983 suits against local officials, and therefore conflicts with this Court's decisions and the decisions of every federal court of appeals.

Without authority, the Fourth Circuit has made the First and Fourth Amendments directly applicable to local officials. Summary reversal is appropriate and necessary in this case, since the constitutional principles are well-settled, the relevant facts are not in dispute, and the decision below is manifestly erroneous. U.S. Sup. Ct. R. 16.1; Schweiker v. Hansen, 450 U.S. 785, 791 (1981) (Marshall, J., dissenting).

The Bill of Rights to the United States Constitution, including the First and Fourth Amendments, constrains only the conduct of officials of the federal government. Wallace v. Jaffree, 472 U.S. 38, 49 (1984) (First Amendment); Wolf v. Colorado, 338 U.S. 25 (1949) (Fourth Amendment); see

generally, L. Tribe, American Constitutional Law § 18-1 n.1 (2d ed. 1988); 2 R. Rotunda, J. Nowak, J. Yourn, Treatise on Constitutional Law, § 14.2 (1986). The constitutional doctrine of "selective incorporation" of the Bill of Rights by the Fourteenth Amendment provides that the Fourteenth Amendment is the authority, and the only authority, for restraining the conduct of state and local officials in the same manner that the First and Fourth Amendments restrain the conduct of federal officials. Soldal v. Cook County, 113 S.Ct. 538, 543 n.6 (1992) ("Under 42 U.S.C. § 1983, the Soldals were required to establish that the respondents, acting under color of state law, deprived them of a constitutional right, in this instance, their Fourth and Fourteenth Amendment freedom from unreasonable seizures by the state."); Wolf v. Colorado, 338 U.S. 25 (1949). See, also, Zinermon v. Burch, 494 U.S. 113, 125 (1990); Mapp v. Ohio, 367 U.S. 643 (1961). Indeed, prior to Wolf v. Colorado, federal courts did not have the power

to hear cases involving unreasonable searches and seizures by local police under of the United States Constitution. Weeks v. United States, 232 U.S. 383 (1914); Twining v. New Jersey, 211 U.S. 78, 92 (1908) ("[S]ince by the unvarying decisions of this court the first ten Amendments of the Federal Constitution are restrictive only of National action, there was nowhere else to look up to the time of the adoption of the Fourteenth Amendment...").

All circuit courts rely on the selective incorporation of the Fourth Amendment into the Fourteenth Amendment as a jurisdictional necessity when local officials are sued under § 1983. For example, see:

D.C. Circuit

Kirkland v. Preston, 385 F.2d 670, 674 (D.C. Cir. 1967)

> "[B]efore (Wolf v. Colorado) made the Fourth Amendment applicable to the states through the Fourteenth, and [Mapp v. Ohio] made it enforceable against them by the same sanctions and by application of the same constitutional standards as prohibit unreasonable searches and seizures by the

federal government, the quantum of evidence needed for arrest in the individual states was not a matter of federal concern."

First Circuit

Willhauck v. Halpin, 953 F.2d 689, 703 (1st Cir. 1991)

"[T]o state a proper § 1983 claim, Willhauck needed to allege violations of his federal rights resulting from the conduct of the police officers involved in the car chase. Willhauck did so in his complaint to the extent that he alleged a violation of his Fourth and Fourteenth Amendment rights."

Second Circuit

United States ex rel. Bruno v. Herold, 408 F.2d 125, 132 n.2 (2d Cir. 1969)

"Fourth Amendment prohibition against unreasonable searches and seizures applied to the states".

Third Circuit

Mahone v. Waddle, 564 F.2d 1018, 1025 n.8 (3rd Cir. 1977)

"The Fourth Amendment is "made applicable against the state though incorporation into the fourteenth amendment."

Fourth Circuit

Martin v. Gentile, 849 F.2d 863, 867 (4th Cir. 1988)

"[T]he due process clause of the fourteenth amendment is the source of three distinctly different types of constitutional protection against state interference .... First, it incorporates against the states certain provisions of the Bill of Rights, including the fourth amendment's prohibition against unreasonable searches and seizures...."

Fifth Circuit

Wheeler v. Cosden Oil & Chem. Co., 734 F.2d 254, 259 n.11 (5th Cir. 1984)

"[T]he Fourth Amendment's requirement of probable cause to arrest has been incorporated into the Fourteenth Amendment due process clause and is thus applicable to the states."

Sixth Circuit

Lovvorn v. City of Chattanooga, 846 F.2d 1539, 1542 (6th Cir. 1988)

"By virtue of the fourteenth amendment, the fourth amendment prohibits unreasonable searches and seizures by the states."

Seventh Circuit

Patton v. Przybylski, 822 F.2d 697, 699 (7th Cir. 1987)

"The Fourth Amendment forbids unreasonable searches and seizures, and Wolf v. Colorado ... held the Fourth Amendment applicable to the states by virtue of the Fourteenth Amendment."

Eight Circuit

Martin v. Wyrick, 568 F.2d 583, 585 (8th Cir. 1978)

The Fourteenth Amendment applies the Fourth Amendment rules pertaining to search and seizure to state trials.

Ninth Circuit

Smith v. City of Fontana, 818 F.2d 1411, 1416 n.6 (9th Cir. 1987)

"The Fourth Amendment [is] made applicable to the states through the Fourteenth Amendment....".

Tenth Circuit

Specht v. Jensen, 832 F.2d 1516, 1521 (10th Cir. 1987)

"[T]he right to be free from unreasonable searches and seizures originates in the Fourth Amendment and is applied to the states

through the Fourteenth Amendment due process clause."

Eleventh Circuit

Kerr v. City of West Palm Beach, 875 F.2d 1546, 1548 n. 4 (11th Cir. 1989)

"By its own terms, the fourth amendment protects the citizenry only against unlawful actions by federal officials; the due process clause of the fourteenth amendment to the Constitution, however, incorporates the guarantees of the fourth amendment with regard to unlawful actions by state and municipal actors".

In each of these cases, the court recognizes that constitutional violations caused by local officials are only actionable by virtue of the Fourteenth Amendment and the incorporation into the Fourteenth Amendment of substantive protections contained in the Bill of Rights.[2]

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[2]The Fourteenth Amendment itself provides substantive limits on the breadth of those constitutional rights selectively incorporated into the Fourteenth Amendment. Bonner v. Coughlin, 517 F.2d 1311 (7th Cir. 1975); Daniels v. Williams, 474 U.S. 327 (1985). Under Enweremadu's "new" cause of action, those Fourteenth Amendment substantive limits would no longer define the defenses available to Reichlin.

The majority panel's Opinion, which eliminates the necessity of invoking the Fourteenth Amendment, thus conflicts not only with long-standing precedent from this Court, but with well-settled jurisprudence recognized and followed in every circuit court of appeals.[3]

The Fourth Circuit Opinion in Enweremadu mentioned the doctrine of selective incorporation of the Bill of Rights into the Fourteenth Amendment, but referred to the doctrine as a "technical matter". As Judge Luttig concluded in the Dissent, however:

> [T]he statutory and constitutional requirements and limitations of federal jurisdiction and power are not the sort of technicalities that [the court is] free to ignore. Neither are the fundamental principles governing the Fourteenth Amendment's

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[3]As the Dissent noted, "[i]f, as the majority seems to believe, the Fourth Amendment independently represented a source of substantive rights against [Officer Reichlin], incorporation of the Fourth Amendment as against the States would never have been necessary." App. 21-22.

> relationship to the Bill of Rights. The Fourteenth Amendment is not 'merely the avenue through which Fourth Amendment rights apply to state actors', as the majority suggests. [citation omitted]. Through the doctrine of selective incorporation of the Bill of Rights into the Fourteenth Amendment's due process clause that Amendment is the source of any substantive rights susceptible to vindication through Section 1983 that the Enweremadus had against [Officer Reichlin].

App. 20-21 (emphasis in original).

Accordingly, by allowing Enweremadu to maintain a cause of action against Officer Reichlin under the First and Fourth Amendments, the panel majority eliminated the Fourteenth Amendment as an essential jurisdictional element of a cause of action arising under the United States Constitution against local officials, in derogation of settled

principles of federalism and established precedent from this Court.[4]

The Opinion excuses this fundamental jurisdictional flaw in the Complaint by concluding that the Complaint alleges facts that could support some cause of action establishing the trial court's jurisdiction. However, as the Dissent correctly states, reference to the underlying facts alleged in the Complaint does not cure Enweremadu's basic jurisdictional failure of having consciously asserted a non-existent cause of action:

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[4]"[T]he Federal Constitution provides few substantive protections against oppressive state laws. Apart from § 10 of Article I, which forbids States from, among other things, passing any ex post facto law, bill of attainder, or law impairing the obligation of contracts, and apart from the developed application of the Bill of Rights to the States, the Constitution does not directly impose any barrier between the citizen and coercive state power. And even the protections guaranteed by the Bill of Rights, in their literal language, run against only the Federal Government." H. Blackmun, Section 1983 and Federal Protection of Individual Rights - Will the Statute Remain Alive or Fade Away?, 60 N.Y.L. Rev. 1, 3 (1985).

> [The majority panel] misperceive[s] this case as one about the factual sufficiency of pleadings, when instead it is about jurisdiction and the limits on judicial power.

App. 17. The majority's Opinion focuses on the adequacy of Enweremadu's factual assertions without first deciding whether she has any jurisdictional basis to even maintain an action in federal court. No conceivable factual allegations can substitute for the jurisdictional necessity of prosecuting a cause of action based on the Fourteenth Amendment. Bell v. Hood, 327 U.S. 678 (1946); See also, 5 C. Wright & A. Miller, Federal Practice and Procedure, Civil 2d., § 1206, p. 89 (1990).

Enweremadu was afforded numerous opportunities to cure her jurisdictional flaw but consciously persisted in pursuing a constitutionally defective First and Fourth Amendment action against local officials. As the District Court expressed in both of its opinions, it had no option but to dismiss Enweremadu's suit given her deliberate failure to

request leave to assert a Fourteenth Amendment violation despite clear warnings from Officer Reichlin and the District Court that she must plead the Fourteenth Amendment to avoid summary dismissal.[5] As the Dissent commented, "it certainly was not an abuse of discretion to dismiss the case after having given the plaintiffs ample opportunity to amend, as did the district court." App. 19 n.3. No trial court is permitted to insert into a pleading a cause of action which a plaintiff has consciously refused to raise in order to

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[5]Under Virginia law, if Enweremadu's lawsuit is dismissed, she will be free to assert her pendent state claims in state court. Virginia law provides that the running of the statute of limitations on her pendent claims is tolled during the pendency of a lawsuit. § 8.01-229(E)(1), Code of Virginia, 1950, as amended. If this lawsuit is dismissed, the statute will be tolled during the entire time that this lawsuit was pending. Moreover, two of the litigants are minors, and the two year statute will not even begin to run against their claims until they reach the age of 18. § 8.01-229(A)(1), Code of Virginia, 1950, as amended.

preserve the jurisdictionally unsound claim demanded by the plaintiff.[6] As Judge Luttig stated in his Dissent:

> [I]n no case, however, should, or in my view, can, a court gratuitously offer litigants relief from their counsel's errors by ignoring statutory and constitutional constraints imposed upon the judicial power.

App. 26. (Emphasis in original). Whether or not Enweremadu alleged sufficient facts to support recovery for a constitutional violation is not the issue. The issue is whether she stated a cognizable federal claim. "If the right here asserted is not a Federal right, this is the end of the case. We have no authority to go further ...." Twining v. New Jersey, 211 U.S. at 91. It is not appropriate for courts

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[6]"Before deciding that there is no jurisdiction, the District Court must look to the way the complaint is drawn to see if it is drawn so as to claim a right to recover under the Constitution and laws of the United States. For to that extent 'the party who brings a suit is master to decide what law he will rely upon and ... does determine whether he will bring a "suit arising under" the ...[Constitution or laws] of the United States .... " Bell v. Hood, 327 U.S. 678, 681 (1946).

to construct causes of action for litigants who, for whatever reason, chose to assert a fundamentally fatal legal theory.

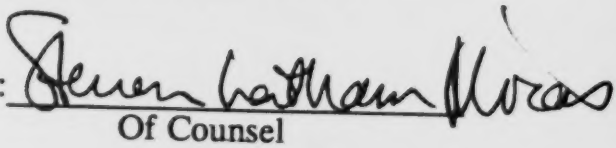
CONCLUSION

Enweremadu, represented by counsel, asserted claims against local officials solely under the First and Fourth Amendments despite long-established precedent from this Court requiring those claims to be brought under the Fourteenth Amendment. The conflict with the decision of this Court and the federal circuits cuts to the heart of federalism and of the constitutional distinction between the states and the United States. The error of the Fourth Circuit's Opinion is "palpably clear" constitutional error, Eaton v. Tulsa, 415 U.S. 697, 707 (1974) (Rehnquist, J., dissenting), and the Opinion will be cited in the future to advance the new constitutional right that it creates. Since the law is well-settled, the relevant facts are not in dispute, and the decision below is clearly erroneous, Schweiker v. Hansen, 450 U.S. 785 (1981) (Marshall, J., dissenting), this

court should issue a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit and summarily reverse the decision below.

Respectfully submitted,

J. L. REICHLIN, Individually,
UNKNOWN POLICE
OFFICERS OF THE
CHESTERFIELD COUNTY
POLICE DEPARTMENT

By: 
Of Counsel

Steven Latham Micas
County Attorney
(Counsel of Record)
Jeffrey Lee Mincks
Chesterfield County
P. O. Box 40
Chesterfield, VA 23832
(804)748-1491

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

VIRGINIA ENWEREMADU; STANIEL ENWEREMADU, an infant, by and through Virginia Enweremadu, her mother and next friend; STANTON ENWEREMADU, an infant, by and through Virginia Enweremadu, his mother and next friend,

Plaintiffs-Appellants.

v.

No. 92-1845

J. L. REICHLIN, individually, UNKNOWN POLICE OFFICERS OF THE CHESTERFIELD COUNTY POLICE DEPARTMENT,

Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. Richard L. Williams, Senior District Judge. (CA-91-598-R)

Argued: June 7, 1993

Decided: August 18, 1993

Before MURNAGHAN, HAMILTON, and LUTTIG, Circuit Judges.

Reversed by unpublished per curiam opinion. Judge Luttig wrote a dissenting opinion.

COUNSEL

ARGUED: Beverly Diane Crawford, EL-AMIN & CRAWFORD, P.C., Richmond, Virginia, for Appellant. Steven L. Micas, County Attorney, Chesterfield, Virginia, for Appellees. **ON BRIEF:** Sa'ad El-Amin, EL-AMIN & CRAWFORD, P.C., Richmond, Virginia, for Appellant, Jeffrey L. Mincks, Deputy County Attorney, Michael S. J. Chernau, Assistant County Attorney, Chesterfield, Virginia, for Appellees.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

PER CURIAM:

Virginia Enweremadu and her two minor children, Staniel and Stanton, have appealed from the district court order dismissing with prejudice their civil rights action for failing to state a claim upon which relief could be granted, Fed. R. Civ. P. 12(b)(6), and dismissing without prejudice

several pendent state law claims, and the court's denial of their request to alter or amend judgment pursuant to Fed. R. Civ. P. 59(e) and 60(b). They have argued on appeal that dismissal of their suit was inappropriate where the only reason cited by the district court was their failure to reference the Fourteenth Amendment in an otherwise sufficient complaint.

The plaintiffs filed the underlying suit for damages against J. L. Reichlin, a police officer with the Chesterfield County Police Department, and other unknown police officers of the Chesterfield County Police Department, alleging that they were assaulted and abused by Reichlin and the other officers when the officers attempted to serve two misdemeanor warrants on Virginia Enweremadu in her home on March 6, 1990.

In their complaint, the plaintiffs give the following account of the events that took place on March 6, 1990. On that date, Reichlin went to the Enweremadus' home in Chesterfield County, Virginia, to serve the misdemeanor warrants on Virginia Enweremadu. When Reichlin arrived, Enweremadu was at work. Enweremadu's daughter Staniel, who was thirteen at the time, answered the door and told

Reichlin she could not open the door for anyone per her mother's instructions. Reichlin then allegedly threatened to break down the door, drag Staniel outside, and choke her if she refused to open the door. Staniel became upset and called her mother at work. When Enweremadu arrived home, Reichlin had left the premises, but both her children were upset and crying, Enweremadu called 911 to request assistance.

Shortly thereafter, Reichlin returned, entered without knocking through an open door, and informed Enweremadu that he had a warrant for her arrest. Enweremadu attempted to call 911 again for assistance, and as she did so, Reichlin allegedly grabbed her from behind in a chokehold. Stanton, who was ten years old, attempted to rescue his mother from Reichlin. Reichlin allegedly reacted by striking the boy in the face, throwing him backwards.

Enweremadu has alleged that when she again attempted to call 911, Reichlin pulled the telephone from the wall. Staniel phoned 911 to report the incident, during which time it is charged that Reichlin again grabbed Enweremadu in a chokehold. When the 911 dispatcher called the Enweremadu home, Enweremadu has alleged that

Reichlin stopped his assault on her.

According to the plaintiffs, when the other officers arrived, Reichlin told them that Enweremadu had resisted arrest. She denied this; but an unknown officer allegedly grabbed her around the neck and rendered her semi-conscious. When she regained consciousness, she was lying on her couch with her feet and hands bound. Staniel also was grabbed around the neck by unknown police officers.

Following the arrest, Enweremadu was taken to the Chesterfield County Police Department. The misdemeanor warrants in question had been issued based on Enweremadu's alleged theft of less than five dollars from a Richmond man and her alleged wilful damage of his property. She was unaware of the charges until the day of her arrest. As a result of the general melee surrounding the execution of the warrants, Enweremadu also was charged with resisting arrest and remained incarcerated for two days until she could raise a $2000 bond. The resisting arrest charge subsequently was dismissed.

Based on the foregoing events as described in their complaint, Enweremadu and her children filed suit pursuant to 42 U.S.C. § 1983 in the federal district court in the

Eastern District of Virginia on October 17, 1991. The Enweremadus alleged that Reichlin and the other unknown police officers used excessive force in serving the misdemeanor warrants in violation of the Fourth Amendment and that the officers violated their First Amendment free speech rights. In addition, they proffered state claims of gross negligence, assault and battery, and malicious prosecution. The jurisdictional section referenced the First and Fourth Amendments of the U.S. Constitution, 42 U.S.C. §§ 1983 and 1988, and 28 U.S.C. § 1343.

Approximately six months after the complaint was filed (and after the applicable two-year statute of limitations had run), Reichlin and the other officers filed a motion to dismiss pursuant to Rule 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, arguing that the plaintiffs had failed to state a federal claim upon which relief could be granted, because their complaint did not specifically reference the Fourteenth Amendment.

Plaintiffs' counsel responded in a brief, stating that he understood the interconnection between the Fourteenth Amendment and the First and Fourth Amendment claims. He did not, however, move to amend the complaint. The

defendants replied, reiterating their contention that the complaint was inadequate as it did not specifically mention the Fourteenth Amendment.

On May 13, 1992, the district court in a Memorandum Opinion granted defendants' motion to dismiss with prejudice, pursuant to Fed. R. Civ. P. 12(b)(6). The district court concluded that the plaintiffs' failure to cite the Fourteenth Amendment in their complaint was fatal and required dismissal because, under the doctrine of selective incorporation, the First and Fourth Amendments only apply to state officials through the due process clause of the Fourteenth. The court declined to exercise supplemental jurisdiction over plaintiffs' pendent state law claims, which were dismissed without prejudice.

On May 22, 1992, the Enweremadus filed motions to alter and amend the court's order of May 13, 1992, and for relief from the judgment pursuant to Rules 59(e), 60(b)(1), and 60(b)(6) of the Federal Rules of Civil Procedure. On June 8, 1992, the appellants filed a motion for leave to file an amended complaint pursuant to Fed. R. Civ. P. 15(a).

On June 18, 1992, the district court entered its order denying plaintiffs' motions to alter and amend judgment, for

relief from judgment, and for leave to amend. In its Memorandum Opinion, the district court, in response to plaintiffs' motion for relief from judgment, stated:

> Even if Plaintiff's counsel did misunderstand the thrust of the Defendant's motion to dismiss, the misunderstanding does not rise to the level of "excusable neglect." ... Plaintiff's assertion that she misunderstood the basis for the Defendant's motion is simply not credible. Even if true, however, such assertion reflects extreme carelessness for which no acceptable excuse has been alleged or shown.

With regard to the motion to amend the complaint, the court concluded that:

> Once a judgment is entered, the filing of an amendment to a complaint cannot be allowed until the judgment is set aside or vacated under rule 59 or Rule 60 ... In other words, despite the liberal amendment policy of rule 15(a), a party moving for amendment after judgment has been entered will be successful only if she first demonstrates that the judgment should be set aside for one of the six reasons specified in rule 60(b).

The court did not find any of the six reasons to be present and denied the motion. The plaintiffs, by appeal, have challenged both the 12(b)(6) dismissal and the denial of an

opportunity to alter or amend.

We review *de novo* the district court's dismissal under Rule 12(b)(6). *Schatz v. Rosenberg*, 943 F.2d 485, 489 (4th Cir. 1991), *cert. denied*, ____U.S. ____, 112 S.Ct. 1475 (1992). In conducting our review, we must accept as true all allegations stated in the complaint. *Adams v. Bain*, 697 F.2d 1213, 1216 (4th Cir. 1982). Dismissal under Rule 12(b)(6) is not appropriate "unless it appears beyond doubt that the plaintiff can prove no set of facts to support his [or her] claim which would entitle him [or her] to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *see also Revene v. Charles County Commrs.*, 882 F.2d 870, 872 (4th Cir. 1989).

The events described in the Enweremadus' complaint, if accepted as true, adequately state a Fourth Amendment claim even without express reference to the Fourteenth Amendment. The contention that the appellants have failed in their pleadings to note the jurisdictional connection provided by the Fourteenth Amendment does not alter the integrity of the factual allegations or otherwise make the complaint appropriate for dismissal under Rule 12(b)(6). Here, the complaint alleged, in part, that Reichlin and the other officers acted unreasonably, in light of the

surrounding circumstances, in their use of force against the Enweremadus. If that allegation is proven, then there has been a violation of the Enweremadus' Fourth Amendment Rights and they have a cause of action under § 1983. *See Graham v. Connor*, 490 U.S. 386 (1989).

Although it is true, as a technical matter, that the Fourth Amendment only applies to the states by means of the Fourteenth Amendment, it was and is clear from the nature of the action that the appellants have contended that their federal constitutional rights were violated by state officials. The Enweremadus sued the officers under the Civil Rights Act, 42 U.S.C. § 1983, which was enacted in order to allow exactly the type of suit at issue here.* Moreover, the Fourth Amendment, not the Fourteenth, provides the applicable legal standard in an excessive force case. *Graham*, 490 U.S. at 394-397. Thus, the Fourteenth

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*In order to state a cause of action under 42 U.S.C. § 1983, a plaintiff must allege that (1) the defendant deprived her of a federal right and (2) that the defendant did so while acting under color of state law. *See Gomez v. Toledo*, 446 U.S. 635, 640 (1980). The Enweremadus adequately alleged both components.

Amendment is merely the avenue through which Fourth Amendment rights apply to state actors. Accordingly, the failure to mention the Fourteenth Amendment in a complaint does not undermine the validity of the substantive claim, nor justify dismissal where the plaintiffs can prove a set of facts in support of their claim. *Cf. Conley*, 355 U.S. at 45-46.

In the Fourth Circuit, it is well-established that a complaint should not be dismissed if it alleges facts that clearly show jurisdiction exists. In *Provident Life & Accident Ins. Co. v. Waller*, 906 F.2d 985, 988 (4th Cir.), *cert. denied*, 498 U.S. 982 (1990), we recognized that "it is well settled that courts may excuse pleading defects if the facts alleged in the complaint and the relief requested demonstrate the existence of a substantial federal question." *See Blue v. Craig*, 505 F.2d 830, 844 (4th Cir. 1974) ("[I]f the facts giving the court jurisdiction are set forth in the complaint, the provision conferring jurisdiction need not be specifically pleaded.") (quoting *Williams v. United States*, 405 F.2d 951, 954 (9th Cir. 1969)). We believe that the facts alleged in the Enweremadus' complaint demonstrate that a federal question is involved.

Consequently, the police officers' motion for a dismissal under Fed. R. Civ. P. 12(b)(6) should have been denied, and the Enweremadus' complaint should be reinstated. The pendent state claims should follow for the applicable rules of law will doubtless be properly dealt with at the appropriate time.

Accordingly, the judgment of the district court is

REVERSED.

LUTTIG, Circuit Judge, dissenting:

The court holds today by unpublished opinion that an experienced district judge abused his discretion in dismissing a complaint under 42 U.S.C. § 1983 filed by counseled plaintiffs which, even after an opportunity to amend has been provided, alleged that *local* police officers violated a plaintiff's *Fourth Amendment* rights. In so holding, the majority not only disregards both parties' arguments (not even the appellants brought such a claim to this court), it misconstrues the scope of the liberal pleading standards of the Federal Rules of Civil Procedure and ignores one of the most elementary principles of constitutional law -- that no cause of action under the Fourth Amendment exists against state and local officials.

The district court lacked both jurisdiction over and the power to afford relief on appellants' complaint because it failed to allege a nonfrivolous federal cause of action. As a consequence, the court had no choice under law but to dismiss the complaint under Fed. R. Civ. P. 12(b). I would summarily affirm that dismissal, as well as the court's decision to do so with prejudice.

I.

The relevant facts of this appeal bear repeating. On October 17, 1991, the Enweremadus, through their counsel, Sa'ad El-Amin, Esq., filed a complaint in the district court against appellees, who are local police officers. The Enweremadus averred in the jurisdictional section of their complaint that the action arose "under the provisions of the First and Fourth Amendments to the United States Constitution" and under 42 U.S.C. §§ 1983 and 1988. They asserted that the court had jurisdiction over appellants' federal claims under 28 U.S.C. § 1343. J.A. at 2. The complaint, however, did not reference the Fourteenth Amendment.

On April 6, 1992, appellees moved to dismiss the complaint pursuant to Federal Rules of Civil Procedure

12(b)(1) and 12(b)(6), on the ground that, because the First and Fourth Amendments do not apply to local officials, "an allegation that a local official has violated the First or Fourth Amendment to the United States Constitution states no claim upon which relief can be granted under 42 U.S.C. § 1983." *Id.* at 12. Appellees argued that, since the Enweremadus alleged only that the officers had abridged their First and Fourth Amendment rights, they had not set forth a federal claim, and "[i]n the absence of a federal cause of action, the Court has no jurisdiction under 28 U.S. C. § 1343." *Id.* at 13.

Mr. El-Amin responded in a formal brief, asserting that he was fully aware of the doctrine of selective incorporation, "which enforces First and Fourth Amendment Rights against State officials pursuant to the Fourteenth Amendment." He did not, however, move to amend the complaint. *Id.* at 33. The officers' reply brief, dated April 22, 1992, warned the Enweremadus and Mr. El-Amin that they had "completely misse[d] the point" and reiterated that the jurisdictional defect in appellants' complaint was that it "alleged no violation of [their] rights under the Fourteenth Amendment." *Id.*

On May 13, 1992, after providing appellants every opportunity to amend their complaint, the district court dismissed their federal claims with prejudice, and their state claims without prejudice. It thereafter denied Mr. El-Amin's motions to alter and amend judgment, for relief from judgment, and for leave to file an amended complaint that alleged violations of appellants' Fourteenth Amendment rights. Although sympathizing with the Enweremadus for having to suffer for the "serious and obvious" errors and "extreme carelessness" of their "experienced counsel,"[1] the court held that appellants had presented no legal theory and advanced no explanation of their attorney's conduct under which it could disturb its earlier decision. *Id.* at 68-70. This appeal followed.

II.

The majority holds on the aforementioned facts that the district court abused its discretion in dismissing the

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[1]As the district court correctly observed, Mr. El-Amin was not a novice in the practice of law. He was admitted to the bar in 1969. He is a seasoned civil rights and criminal defense lawyer who has argued over fifteen cases before this court in the last decade.

Enweremadus' complaint. Underlying the court's holding is its fundamentally mistaken belief that the Enweremadus' complaint states a cause of action under the Fourth, even if not under the Fourteenth Amendment, and thus that they satisfied the requirement of section § 1983 that the plaintiff allege a deprivation of a federal right. The court's remarkable conclusion is worthy of quotation: "The events described in the Enweremadus' complaint, if accepted as true, adequately state a Fourth Amendment claim even without express reference to the Fourteenth Amendment." *See ante* at 6; *see also id.* at note 1 (setting forth pleading requirements for section 1983). This, of course, is simply incorrect. The Enweremadus' complaint does *not* state a Fourth Amendment claim, because the actions of which they complain are those of state officials, and the Fourth Amendment does not provide a cause of action against such officials.

The majority's fundamental misconception of the nature and interrelationship of the Fourth and Fourteenth Amendments, which appears attributable to its confusion over the fact that Fourth Amendment standards govern Fourteenth Amendment analysis, *see, e.g.*, *ante* at 6-7, causes

it, in turn, to misperceive this case as one about the factual sufficiency of pleadings, when instead it is about jurisdiction and the limits on judicial power. As appellees observe, "*[n]o one disputes that appellants here have alleged sufficient facts to support recovery for a constitutional violation.*" Appellees' Br. at 5 n.4 (emphasis added). Thus, the only issue before the court, as appellees argued below, is whether dismissal was required under Rules 12(b)(1) of 12(b)(6) because the Enweremadus' failure to allege a cause of action under the Fourteenth Amendment left the district court without either the jurisdiction to entertain appellants' claims or the power to afford them relief on those claims.[2]

The majority's reliance on *Conley v. Gibson*, 355 U.S. 41 (1957), is, for the same reason, misplaced. In *Conley*, the

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[2]Although the differences between Rules 12(b)(1) and 12(b)(6) are often significant, in this context they are of little, if any, practical importance, and dismissal was required under both rules. Because appellants' claims of a Fourth Amendment violation was patently frivolous, the court had no jurisdiction over the complaint. *See Bell v. Hood*, 327 U.S. 678, 681-83 (1946). By the same token, because the complaint was not based upon an existent federal cause of action, it also was not one upon which relief could be granted.

Supreme Court faced contentions that Rule 12(b)(6) dismissal was warranted on two separate grounds: that racial discrimination in collective bargaining representation was not actionable under the Railway Labor Act, and that the plaintiffs' complaint failed to set out specific facts to support their claim of discrimination. *Id.* at 45-47. The Court rejected the first contention based on its precedent, and the second because "the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim," but may instead be satisfied by a short, plain statement of the claim. *Id.* at 47.

Conley does not address the question of whether Rule 12(b)(6) dismissal is appropriate when relief cannot be granted because the complaint urges recovery on the basis of a nonexistent federal cause of action. Nor does that case address the circumstances under which Rule 12(b)(1) dismissals are appropriate because of the frivolousness of a putative federal cause of action. That case addresses only the circumstances under which Rule 12(b)(6) dismissal is appropriate on the ground that the plaintiff failed to allege sufficiently the facts supporting an undisputed federal cause of action. *See id.* at 45-46 ("[A] complaint should not be

dismissed *for failure to state a claim* unless it appears beyond doubt that the plaintiff can prove *no set of facts* in support of his claim which would entitle him to relief." (emphases added)). *Conley*, in other words, teaches only that a court determining whether a complaint sets forth the material elements of a claim should liberally construe the facts alleged in support of a cognizable federal cause of action; it in no respect relieves plaintiffs of their obligation to assert a claim cognizable within the jurisdiction of the district court and upon which the court can grant relief. *See, e.g., Leimer v. State Mut. Life Assur. Co.*, 108 F.2d 302, 305 (8th Cir. 1940) (cited with approval in *Conley*, 355 U.S. at 46 n.5)(Federal Rules of Civil Procedure "require that a complaint shall contain ... the necessary jurisdictional averments" in addition to "'a short and plain statement of the claim showing that the pleader is entitled to relief.'" (emphasis added) (quoting Fed. R. Civ. P. 8(a)(2))).[3]

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[3]The majority relies upon *Provident Life & Accident Ins. Co. v. Waller*, 906 F.2d 985 (4th Cir. 1990), *cert. denied*, 498 U.S. 982 (1990), and *Blue v. Craig*, 505 F.2d 830 (4th Cir. 1974), for its conclusion that the District Court abused its discretion in dismissing the Enweremadus' suit. Neither

Perhaps, as the majority asserts, this case does turn on a technicality, but the statutory and constitutional requirements and limitations of federal jurisdiction and power are not the sort of technicalities that we are free to ignore. Neither are the fundamental principles governing

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case suggests an abuse of discretion by the District court. The Court created in *Provident Life* the very federal common law cause of action upon which it concluded that federal jurisdiction rested. The plaintiff, therefore, previously had no reason to believe that such a cause of action even existed. In *Blue*, the plaintiff specifically pleaded, *by citation to the relevant statute*, a proper cause of action. 505 F.2d at 834. In *dicta*, the court observed that the plaintiff also had an alternative ground for possible recovery under the Supremacy Clause of the Constitution. As to this ground, however, the plaintiff specifically pleaded the *jurisdictional* fact that gave rise to the federal cause of action, namely, that the state regulation conflicted with the federal statute. *Id.* at 844. Thus, that court had no occasion even to address the question presented *sub judice*.

Here in contrast, the Enweremadus pled a specific cause of action that, at law, does not exist. In this context, even assuming it would have been error to dismiss the complaint without providing an opportunity to amend, *see id.*, it certainly was not an abuse of discretion to dismiss the case after having given the plaintiffs ample opportunity to amend, as did the district court.

the Fourteenth Amendment's relationship to the Bill of Rights. The Fourteenth Amendment is not "*merely* the avenue through which Fourth Amendment rights apply to state actors," as the majority suggests. *Ante* at 7 (emphasis added). Through the doctrine of selective incorporation of the Bill of Rights into the Fourteenth Amendment's due process clause, that Amendment is the source of any substantive rights susceptible to vindication through section 1983 that the Enweremadus had against the state appellees.[4] If, as the majority seems to believe, the Fourth

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[4]*See, e.g., Wallace v. Jaffree*, 472 U.S. 38, 49 (1985) (relationship of Fourteenth and First Amendments); *Baker v. McCollan*, 443 U.S. 137, 141-42 (1979) (relationship of Fourteenth and Fourth Amendments). *Graham v. Connor*, 490 U.S. 386 (1989), cited by the majority, is not to the contrary. There, in a case involving a claim of excessive use of force made against local police officers, the Supreme Court held that all excessive force claims are to be analyzed under the Fourth Amendment's "reasonableness" standard. The Fourth Amendment was not the source of the right allegedly infringed upon by the officers, however, *the Court explicitly noted that the plaintiff had alleged that the officers' excessive use of force had violated "rights secured to him under the Fourteenth Amendment to the United States Constitution."* *Id.* at 390 (internal quotation omitted) (emphasis added).

Amendment independently represented a source of substantive rights against appellees, incorporation of the Fourth Amendment as against the States would never have been necessary. Therefore, because appellants failed to allege a violation of their Fourteenth Amendment rights, the district court had no jurisdiction to hear the case, no power to afford relief, and therefore no choice but to dismiss the Enweremadus' complaint.[5]

Significantly, not even appellants contend otherwise. Although the court frames appellants' argument to be "that dismissal of their suit was inappropriate where the only reason cited by the district court was their failure to reference the Fourteenth Amendment in an otherwise sufficient complaint," *ante* at 4, this is not appellants' argument. And no doubt they will be surprised to learn that

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[5]The Complaint did not meet the requirements set forth in Federal Rule of Civil Procedure 8, as the majority asserts, *see ante* at 6 n.*. Not only was its jurisdictional statement defective, *see* Fed. R. Civ. P. 8(a)(1), but the complaint also did *not* show that the Enweremadus were entitled to relief in federal court, as required by Fed. R. Civ. P. 8(a)(2).

such an argument, which would be tantamount to a reaffirmation of the very error they committed below, has been ascribed to them.[6] Rather, appellants effectively (and candidly) admit that dismissal for failure to allege a violation of the Fourteenth Amendment was proper. Their only contention, both in their brief and at argument, is that the district court "abused its discretion in dismissing the [§ 1983 claims] *with* prejudice." Appellants' Br. at 8 (emphasis added); *id.* (Because failure to allege violation of the Fourteenth Amendment could easily have been cured, "dismissal with prejudice was an abuse of the court's discretion."); *see also id.* at 1-2.

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[6]If the court had addressed instead the argument made by the appellants, presumably it would have had to affirm the district court's decision to dismiss with prejudice because, as the majority itself notes, *ante* at 4, the statute of limitations had already run on the Enweremadus' section 1983 claims by the time the district court dismissed the complaint. I would not hesitate to affirm the district court's decision to dismiss with prejudice on this ground or on the alternative ground of the inexplicable, inexcusable, and, suggest appellees, even arrogant, failure of Mr. El-Amin to amend the complaint, despite repeated promptings to do so from appellees and the district court.

III.

The result in this case that is dictated by law may seem harsh on appellants. Indeed the driving force behind the court's decision appears to be its sense that it would be "unfair" if Virginia Enweremadu and her children, who have alleged unlawful mistreatment at the hands of Officer Reichlin and his unknown companions, were to be deprived of their opportunity for redress as a result of the errors and incompetence of their attorney.[7] *See ante* at 6 (quoting Fed. R. Civ. P. 8(f)). To the extent that the facts alleged in

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[7]I am puzzled by the majority's insistence that Mr. El-Amin's persistent refusal to plead the Fourteenth Amendment in a section 1983 suit against local police officers "does not appear even to rise to the level of misstep," despite repeated warnings that this failure would be jurisdictionally fatal to the Enweremadus' action. *See ante* at 7. In my view, had we affirmed the district court, the Enweremadus would have had a viable malpractice claim against their lawyer, who, interestingly, was only recently found by this court to be guilty of an "inexcusable breach of professional conduct." *Doyle v. Murray*, 938 F.2d 33, 35 (4th Cir. 1991). In any event, Mr. El-Amin is today the beneficiary of judicial largesse, and any effort by his defenders to cloak that fact in an assertion that his service to his clients in this matter was anything but indefensible would be unwarranted.

the complaint are true, I share the majority's solicitude for the Enweremadus, but my sympathy does not extend so far as to allow me to disregard what I understand to be the law. Jurisdictional requirements and limitations on the judicial power must be respected, and dismissal in this case works no more "unfairness" than it does in similar contexts.

For example, in *Mallas v. United States*, No. 92-1982 (4th Cir. May 20, 1993), this court, relying on *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988), dismissed for lack of appellate jurisdiction four out of the five plaintiffs who had sought to appeal because their attorney had failed to list them specifically in the notice of appeal, instead listing only the first appellant followed by the commonly used Latin phrase "et al." Because Fed. R. App. P. 3(c) provides that "[t]he notice of appeal shall specify the party or parties taking the appeal," and because the Supreme Court held in *Torres* that "et al." does not satisfy the rule's specificity requirement, we held that we had obtained jurisdiction only "over the only party specified as an appellant in the notice of appeal." *Mallas*, slip op. at 8. Had the attorney for the dismissed plaintiffs in *Mallas* specifically named them in the notice of appeal, his clients

would have prevailed under this court's decision on the merits.

And, of course, an untold number of otherwise viable claims are barred on jurisdictional grounds every day because of an attorney's failure to file a complaint within the applicable statute of limitations. In fact, by missing filing deadlines, by forgetting elementary procedural rules, by making strategic errors at trial, or by otherwise intentionally or inadvertently committing what subsequently are revealed to be mistakes, lawyers regrettably lose winnable cases for their clients every day. That is a risk that, in the interests of both order and finality, our legal system generally requires the client to bear. In some instances, the client may have legal recourse against his attorney in the form of a malpractice suit. In no case, however, should, or in my view, *can*, a court gratuitously offer litigants relief from their counsel's errors by ignoring statutory and constitutional constraints imposed upon the judicial power.

IV.

The Supreme Court has repeatedly observed that, to a large extent, "The party who brings a suit is master to

decide what law he will rely upon and therefore does determine whether he will bring a 'suit arising under' the ... [Constitution or laws] of the United States ..." *The Fair v. Kohler Die & Speciality Co.* 228 U.S. 22, 25 (1913); *see also Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 22 (1983) (quoting this *Kohler Die* language with approval). Here, the Enweremadus did not state on the face of their complaint a nonfrivolous cause of action under federal law. Accordingly, the district court not only lacked jurisdiction over the complaint, it lacked the power -- under any facts they might allege -- to afford the Enweremadus relief on their complaint. The district court had no choice but to dismiss the case. Because the majority concludes that the district court erred merely by following the law and affecting the required dismissal, I respectfully dissent.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

VIRGINIA ENWEREMADU, et al,

Plaintiffs,

v. File No. 91-598

J. L. REICHLIN, et al,

Defendants.

MEMORANDUM OPINION

This matter is before the Court on Defendant's Motion to Dismiss for failure to state a claim upon which relief can be granted pursuant to Fed. R. Civ. P. 12(b)(6). The parties chose to submit this motion on the briefs. For the reasons stated below, the Defendants' motion is GRANTED.

FACTUAL BACKGROUND

On March 6, 1990, Officer J. L. Reichlin of the

Chesterfield County Police Department went to the residence of Virginia Enweremadu in order to serve two misdemeanor warrants against her in the City of Richmond. Enweremadu and her two minor children allege that Reichlin and other police officers used excessive force in violation of Plaintiffs' First and Fourth Amendment rights under the U.S. Constitution (Count I). They also allege that the officers violated state tort law by acting in a grossly negligent manner (Count II), by committing an assault and batter (Count III), by violating Plaintiffs' free speech rights under the Virginia Constitution (Count IV), and by engaging in a malicious prosecution (Count V). Plaintiffs assert a remedy for violation of their First and Fourth Amendment rights under 42 U.S.C. § 1983 and invoke the Court's jurisdiction under 28 U.S.C. § 1343. Plaintiffs invoke the Court's supplemental jurisdiction over their state law claims.

DISCUSSION OF AUTHORITY

A. The Federal Claim

The Bill of Rights to the United States Constitution, including the First and Fourth Amendments, constrains only the conduct of the federal government, not the conduct of

state and local officials. Of course, pursuant to the doctrine of "selective incorporation," the Fourteenth Amendment has been held to restrain the conduct of state and local officials in the same manner that the First and Fourth Amendments restrain the behavior of federal officials. See, e.g., Wallace v. Jaffree, 472 U.S. 38, 49 (1985). However, in this case, Ms. Enweremadu alleges no violation of her rights under the Fourteenth Amendment. Accordingly, because Enweremadu alleges that Reichlin and his fellow officers were acting as local, not federal, officials at the time of their alleged misconduct, the Defendants argue that her claim fails to state a claim upon which relief can be granted. The Court agrees.

The threshold requirement for stating a claim under 42 U.S.C. § 1983 is the deprivation of a right secured to the plaintiff by the Constitution or some other federal law. Where no such deprivation is alleged, no claim for relief has been stated under Section 1983. Baker v. McCollan, 443 U.S. 137, 140 (1979). In this case, the only violation of federal law asserted by Ms. Enweremadu is the alleged violation of her rights under the First and Fourth

Amendments. Because these amendments to not apply to the actions of local officials, Ms. Enweremadu's Complaint fails to state a claim for relief under Section 1983.

In opposing this motion, the Plaintiffs completely ignore or misunderstand the thrust of the Defendants' argument. Ms. Enweremadu cites a number of cases in opposition to the motion to dismiss, none of which are at all on point. The cases cited by the Plaintiffs involve either civil actions that in fact were brought under the Fourteenth Amendment or cases that involve federal, not state or local officials, such as cases involving officials of the District of Columbia. Even more importantly, and certainly more carelessly, the Plaintiffs have failed to request leave to file an amended complaint so that they could add an alleged violation of the Fourteenth Amendment. In sum, the Plaintiffs have done nothing to give the Court any option other than dismissing their claims.

B. The State Law Claims

The Plaintiffs also allege various state law claims arising out of the same nucleus of facts. It is well-settled that a district court may decline to exercise supplemental

jurisdiction over a claim if "the district court has dismissed all claims over which it has original jurisdiction." 28 U.S.C. § 1367(c). Where, as here, there is no longer any federal "hanger" to which the alleged state law claims may be appended, it is in the interests of justice to decline to exercise supplemental jurisdiction over the Plaintiffs' state law claims. See Womble v. Bhangu, 864 F.2d 1212 (5th Cir. 1989). Thus, the Court dismisses the Plaintiff's state law claims.

CONCLUSION

For the foregoing reasons, the Court DISMISSES WITH PREJUDICE the Plaintiffs' federal claim pursuant to Rule 12(b)(6) for failure to state a claim upon which relief can be granted. The Court also declines to exercise its supplemental jurisdiction over the Plaintiffs' associated state law claims. These claims are, therefore, DISMISSED WITHOUT PREJUDICE.

Let the Clerk send a copy of this Memorandum Opinion and the accompanying Order to all counsel of record.

May 13, 1992 — Richard L. Williams

DATE — UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

VIRGINIA ENWEREMADU, et al,

Plaintiffs,

v. File No. 91-598

J. L. REICHLIN, et al,

Defendants.

MEMORANDUM OPINION

This matter is before the Court on Plaintiff's Motion to Alter and Amend Judgment and Relief from Judgment, pursuant to Fed. R. Civ. P. 59(e) and 60(b)(1) and (6). Plaintiff has also moved the Court for leave to file an amended complaint. For the reasons stated below, these motions are DENIED.

BACKGROUND

On May 13, 1992, the Court issued an Order and Memorandum Opinion dismissing Ms. Enweremadu's

federal claims with prejudice and declining to exercise jurisdiction over her state law claims. The Plaintiff's Section 1983 claim against local police officers was dismissed because Ms. Enweremadu failed to allege a violation of the Fourteenth Amendment, instead relying solely on alleged violations of the First and Fourth Amendments. Despite the fact that the Defendant's motion to dismiss clearly warned her of this omission, at no time prior to dismissal did the Plaintiff request leave to amend her Complaint to include a Fourteenth Amendment violation. Ms. Enweremadu is represented by counsel.

MOTION FOR RELIEF FROM JUDGMENT

The Plaintiff, based on Rule 60(b), argues that the Court should relieve her of the judgment entered on May 13, 1992. Rule 60(b) states in relevant part:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect ... or (6) any other reason justifying relief from the operation of the judgment.

Fed. R. Civ. P. 60(b)(1) and (6).

Plaintiff essentially argues that her pleading errors were a result of "excusable neglect."[1] Ms. Enweremadu's entire excuse is summed up in one confusing sentence: "What is involved in this case is an inadvertent rather than a careless omission by plaintiff's counsel to recite the Fourteenth Amendment in the jurisdictional portion of the Complaint." (Pl. Br. at 2.) The Plaintiff also contends that it never filed a motion to amend the complaint because it "misunderstood" the Defendant's argument that an excessive force claim under 42 U.S.C. § 1983 must emanate from both the Fourteenth and Fourth Amendments, not just from the latter. Plaintiff's counsel does not clarify how his inadvertence can be construed as something less than pure carelessness, nor does he explain how he could have possibly not understood the thrust of the Defendant's rather simple motion to dismiss.

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[1]The Plaintiff's reliance on Fed. R. Civ. P. 60(b)(6) is misplaced. Relief from a judgment is only granted under this catch-all provision in cases in which a judgment was obtained by the improper conduct of the prevailing party or where a judgment resulted from the excusable default of the losing party under circumstances going beyond the earlier clauses of the rule. See 11 C. Wright & A. Miller, Federal Practice and Procedure § 2864 at 213 (1973). Neither scenario is presented in this case.

Before relief from a judgment may be granted pursuant to Rule 60(b), the moving party must first demonstrate the existence of one of the grounds for relief set forth in the Rule. Mere incantation of the words "excusable neglect" without evidence of an acceptable excuse or justification for the moving party's errors is not a sufficient basis for relief. See, e.g., Park Corp. v. Lexington Ins. Co., 812 F.2d 894 (4th Cir. 1987). Plaintiff herself concedes that oversights which rise to the level of ignorance or carelessness will not provide a litigant or attorney for relief under Rule 60(b). See, e.g., Cessna Finance Corp. v. Bielenberg Masonry, 715 F.2d 1442 (10th Cir. 1983).

The argument made by the Defendant in its motion to dismiss was simply that it is the Fourteenth Amendment that constrains the conduct of state and local officials in the same manner that the First and Fourth Amendments restrain the behavior of federal officials. Thus, by failing to allege a violation of the Fourteenth Amendment, Ms. Enweremadu failed to state a claim upon which relief can be granted. It is hard to believe that this elementary argument could have been misunderstood by experienced counsel. Moreover, any conceivable confusion should have

been eliminated by the Defendant in his Reply Brief which warned Plaintiff that she had "completely misse[d] the point." (Def. Rep. Br. at 1.)

Even if Plaintiff's counsel did misunderstand the thrust of the Defendant's motion to dismiss, this misunderstanding does not rise to the level of "excusable neglect." As one commentator has written:

> [The moving party] must make some showing of why he was justified in failing to avoid mistake or inadvertence. Gross carelessness is not enough. Ignorance of the rules is not enough, nor is ignorance of the law.

11 C. Wright & A. Miller, Federal Practice and Procedure 2858 at 170 (1973); see also, Byrd v. City of Fayatteville, 110 F.R.D. 71, 73-74 (E.D.N.C. 1986) ("If [excusable neglect] is to include a mere palpable mistake by experience counsel, the requirement will be meaningless."), aff'd without op., 819 F.2d 1137 (4th Cir. 1987); In re Perry, 336 F. Supp. 828 (W.D. Va. 1971) ("[T]here must be some justification for the party's oversight, inadvertence or neglect.").

Plaintiff's assertion that she misunderstood the basis for the Defendant's motion is simply not credible. Even if

true, however, such assertion reflects extreme carelessness for which no acceptable excuse has been alleged or shown.

MOTION TO AMEND COMPLAINT

Once a judgment is entered, the filing of an amendment to a complaint cannot be allowed until the judgment is set aside or vacated under Rule 59 or Rule 60 Courts have not construed the broad amendment policy of Rule 15(a) in a manner which would render these other provisions meaningless. In other words, despite the liberal amendment policy of Rule 15(a), a party moving for amendment after judgment has been entered will be successful only if she first demonstrates that the judgment should be set aside for one of the six reasons specified in Rule 60(b).

CONCLUSION

Because Plaintiff's counsel has demonstrated no justification for his carelessness, the Court finds that the Plaintiff has failed to show "excusable neglect" and, therefore, DENIES the Plaintiffs' motion for relief from judgment. Accordingly, the Plaintiffs' motion to amend the Complaint is also DENIED.

This is a difficult issue. On the one hand, the errors made by Plaintiff's counsel were serious and obvious, although the mistakes were such that they could have been rectified with only minimal effort. Such carelessness should generally not be rewarded by allowing a party to return to the status quo. On the other hand, the person to pay the real price for her attorney's carelessness is the Plaintiff, not her lawyer. Unfortunately, the situation Ms. Enweremadu finds herself in, through no fault of her own, is not uncommon. And while sympathy for such plaintiffs is appropriate, it should not cause courts to easily dismiss the strictures of Rule 60(b) nor to disregard the worthy aims of finality and judicial expediency.

Plaintiff is ADVISED that she may be able to refile her case in state court. Although the Court dismissed Ms. Enweremadu's federal claims with prejudice, the Court failed to exercise supplemental jurisdiction over her state law claims. Thus, Ms. Enweremadu, if she has a meritorious claim, may still be able to get some relief in state court.

Let the Clerk send a copy of the Memorandum Opinion and the accompanying Order to all counsel of

record.

June 18, 1992 — Richard L. Williams

DATE — UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Filed September 15, 1993

No. 92-1845
CA-91-598-R

VIRGINIA ENWEREMADU; STANIEL ENWEREMADU, an infant, by and through Virginia Enweremadu, her mother and next friend; STANTON ENWEREMADU, an infant, by and through Virginia Enweremadu, his mother and next friend,

Plaintiffs - Appellants,

v.

J. L. REICHLIN, individually, UNKNOWN POLICE OFFICERS OF THE CHESTERFIELD COUNTY POLICE DEPARTMENT,

Defendants - Appellees.

ON PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING IN BANC

The appellees' petition for rehearing with suggestion for rehearing in banc was submitted to this Court. As no member of this Court or the panel requested a poll on the

suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Bert M. Montague

Clerk